CIMB BANK BHD v. SEBANG GEMILANG SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
MOHD ZAWAWI SALLEH JCA
[CIVIL APPEAL NO: C-02-2067-09-2013]
19 JUNE 2015

BANKING: *Securities for advances – Loan – Loan facilities granted by appellant (bank) to second defendant to finance construction project – Sinking fund – Progress payment received by second defendant to be deducted into fixed deposit under lien to bank – Second respondent executed deed of assignment and power of attorney of loan facilities to first respondent to complete construction project – Bank closed sinking fund and credited fixed deposit monies to second respondent's account upon completion of project – Whether there was effective assignment in favour of first respondent – Whether deed of assignment made reference to sinking fund – Whether first respondent had right to monies in sinking fund – Whether bank had knowledge of assignment*

The second respondent ('Hamidi Tech Sdn Bhd') opened a current account with the appellant ('CIMB Bank'). One Mohd Hamidi was the sole signatory at the material time. Hamidi Tech Sdn Bhd was awarded three construction projects by the Government of Malaysia. Therefore, CIMB Bank granted Hamidi Tech Sdn Bhd various loan facilities to finance the projects. Based on the terms of the letters of offer, a sinking fund account was created and 5% of every progress payment received by Hamidi Tech Sdn Bhd would be deducted in the form of fixed deposit under lien to CIMB Bank. Hamidi Tech Sdn Bhd proceeded with the construction of the said three projects but was unable to complete the projects. Hamidi Tech Sdn Bhd then executed a deed of assignment and a power of attorney, both dated 19 September 2003, in favour of the first respondent ('Sebang Gemilang') to enable Sebang Gemilang to complete the projects. On 6 May 2004, Hamidi Tech Sdn Bhd made an application to CIMB Bank to add one Amiruddin, a director of Sebang Gemilang as another signatory for the current account. Consequently, on 20 May 2004, Hamidi Tech Sdn Bhd passed a board resolution to approve a change in the authorised signatures in respect of the current account. When Sebang Gemilang completed the projects, CIMB Bank closed the sinking fund account and credited the fixed deposit to Hamidi Tech Sdn Bhd's current account upon Hamidi Tech Sdn Bhd's request. On 20 December 2006, Hamidi Tech Sdn Bhd passed another director resolution to remove Amirudin as the signatory and on 22 December 2006, a copy of the resolution was given to CIMB Bank. After the expiry of the defects liability period, Sebang Gemilang approached CIMB Bank for the release of the monies accumulated in the sinking fund. Upon discovering that the sinking fund account had been closed, Sebang Gemilang commenced an action

against CIMB Bank and Hamidi Tech Sdn Bhd at the High Court. The key findings made by the trial judge, amongst others, were that (i) there was an assignment between Sebang Gemilang and Hamidi Tech Sdn Bhd based on the deed of assignment and the power of attorney dated 19 September 2003; and (ii) pursuant to the two documents, Sebang Gemilang had a right to the monies in the sinking fund when the projects were completed and the defects liability period was over. Hence, the present appeal. The issues that arose for the court's determination, *inter alia*, were (i) whether there was an effective assignment in favour of Sebang Gemilang as the assignment made no reference to the sinking fund and no written notice had been given to CIMB Bank; and (ii) whether CIMB Bank had knowledge of the assignment.

Held (dismissing appeal with costs)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) According to s. 4(3) of the Civil Law Act 1956 ('CLA'), the conditions for effecting an absolute legal assignments are: (i) the assignment must be in writing under the hand of the assignor; (ii) the assignment must be absolute and not by way of charge only; and (iii) express notice in writing must have been given to the person liable to the assignor under the assigned chose in action. As such, the document was capable of constituting a valid assignment under s. 4(3) of the CLA. The failure of Sebang Gemilang to comply with condition (iii) did not prevent Sebang Gemilang from proceeding with its action on the basis that it was an equitable assignee in which the CIMB Bank had been made a party to the proceedings. (paras 11 & 13)

(2) The change of signatory in 2004 was clearly based on the deed of assignment. Hamidi Tech Sdn Bhd had instructed CIMB Bank to add Amiruddin as second signatory for the current account. CIMB Bank's office memorandums dated 25 June 2003, 15 August 2003 and 19 August 2003 respectively were addressed to Amiruddin. All these documents and the circumstances were sufficient to refute CIMB Bank's allegation that the CIMB Bank was never aware of the deed of assignment. The CIMB Bank, at all material times, had constructive knowledge that the monies in the sinking fund had been assigned to Sebang Gemilang and the money belonged to Sebang Gemilang. (paras 15 & 16)

(3) By having knowledge of the assignment, it had cast a duty on CIMB Bank not to participate in a breach of trust. CIMB Bank could not ignore the interests of Sebang Gemilang. At the very least, CIMB Bank ought to have communicated with Amiruddin when it was requested by Hamidi Tech Sdn Bhd to close the sinking funds account. By doing so, CIMB Bank had deprived Sebang Gemilang of its interest and was liable for breach of trust. (paras 17 & 21)

(4) When the plea of *res judiciata* is raised, it is necessary to identify with precision the issue that was decided in the earlier proceedings. The trial judge had made specific findings during the interlocutory proceedings that CIMB Bank was in possession of the documents and thus had knowledge of them. These findings were affirmed by the Court of Appeal in the earlier proceedings. It did not matter whether the order in question was final or interlocutory. It was nevertheless binding on the court and all parties, and may not be reopened the same. (paras 26 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Responden kedua ('Hamidi Tech Sdn Bhd') telah membuka akaun semasa dengan perayu ('Bank CIMB') itu. Satu Mohd Hamidi merupakan penandatangan tunggal pada masa yang material. Hamidi Tech Sdn Bhd telah diberikan tiga projek pembinaan oleh Kerajaan Malaysia. Oleh itu, Bank CIMB telah memberikan Hamidi Tech Sdn Bhd pelbagai kemudahan pinjaman untuk membiayai projek-projek tersebut. Berdasarkan syarat-syarat surat tawaran, Akaun Dana Jaminan telah dibuka dan 5% daripada setiap bayaran progresif yang diterima oleh Hamidi Tech Sdn Bhd akan ditolak dalam bentuk simpanan tetap di bawah lien kepada Bank CIMB. Hamidi Tech Sdn Bhd telah memulakan kerja-kerja pembinaan tiga projek tersebut tetapi gagal menyiapkan projek tersebut. Hamidi Tech Sdn Bhd kemudiannya memeterai satu surat ikatan penyerahhakan dan surat kuasa wakil, kedua-duanya bertarikh 19 September 2003, yang memihak kepada responden pertama ('Sebang Gemilang') untuk membolehkan Sebang Gemilang menyiapkan projek tersebut. Pada 6 Mei 2004, Hamidi Tech Sdn Bhd telah membuat permohonan kepada Bank CIMB untuk menambah Amiruddin, seorang pengarah Sebang Gemilang sebagai penandatangan untuk akaun semasa. Seterusnya, pada 20 Mei 2004, Hamidi Tech Sdn Bhd telah meluluskan resolusi lembaga untuk meluluskan perubahan dalam penandatangan yang diberi kuasa berkaitan dengan akaun semasa. Apabila Sebang Gemilang menyiapkan projek tersebut, Bank CIMB telah menutup Akaun Dana Jaminan dan mengkreditkan deposit tetap tersebut ke akaun semasa Hamidi Tech Sdn Bhd atas permintaan Hamidi Tech Sdn Bhd. Pada 20 Disember 2006, Hamidi Tech Sdn Bhd telah meluluskan satu lagi resolusi pengarah untuk mengeluarkan Amirudin sebagai penandatangan dan pada 22 Disember 2006, suatu salinan resolusi telah diberikan kepada Bank CIMB. Selepas tamat tempoh liabiliti kerosakan, Sebang Gemilang telah memohon kepada Bank CIMB untuk mengeluarkan wang terkumpul dalam Akaun Dana Jaminan. Setelah mengetahui bahawa Akaun Dana Jaminan telah ditutup, Sebang Gemilang telah memulakan tindakan terhadap Bank CIMB dan Hamidi Tech Sdn Bhd di Mahkamah Tinggi. Dapatan utama yang dibuat oleh hakim bicara, antara lain, adalah bahawa (i) terdapat suatu penyerahhakan antara Sebang Gemilang dan Hamidi Tech Sdn Bhd berdasarkan surat ikatan penyerahhakan dan surat kuasa wakil bertarikh 19 September 2003; dan (ii) menurut kedua-dua dokumen tersebut, Sebang

A Gemilang mempunyai hak terhadap wang dalam Akaun Dana Jaminan apabila projek telah siap dan tempoh liabiliti kecacatan sudah berakhir. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan untuk penentuan mahkamah, antara lain, adalah (i) sama ada terdapat penyerahhakan sah yang memihak kepada Sebang Gemilang kerana penyerahhakan tersebut tidak membuat
B sebarang rujukan kepada Akaun Dana Jaminan dan tiada notis bertulis diberikan kepada Bank CIMB; dan (ii) sama ada Bank CIMB mempunyai pengetahuan berkenaan penyerahhakan tersebut.

Diputuskan (menolak rayuan dengan kos)

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman
C **mahkamah:**

(1) Menurut s. 4(3) Akta Undang-Undang Sivil 1956 ('CLA'), syarat-syarat untuk pelaksanaan penyerahhakan mutlak mengikut undang-undang adalah: (i) penyerahhakan perlu dibuat secara bertulis oleh penyerah hak; (ii) penyerahhakan mestilah mutlak dan bukannya satu gadaian
D sahaja; dan (iii) notis nyata secara bertulis harus diberikan kepada orang yang bertanggungjawab terhadap penyerah hak di bawah hak dalam tindakan yang diberi. Oleh itu, dokumen tersebut boleh menjadi penyerahhakan yang sah di bawah s. 4(3) CLA. Kegagalan Sebang Gemilang mematuhi syarat (iii) tidak menghalang Sebang Gemilang
E daripada meneruskan tindakannya atas dasar bahawa ia adalah satu pemegang serah hak ekuiti di mana Bank CIMB telah dijadikan pihak kepada prosiding.

(2) Perubahan penandatangan pada tahun 2004 adalah jelas berdasarkan surat ikatan penyerahhakan. Hamidi Tech Sdn Bhd telah mengarahkan
F Bank CIMB untuk menambah Amiruddin sebagai penandatangan kedua untuk akaun semasa. Memorandum pejabat Bank CIMB bertarikh 25 Jun 2003, 15 Ogos 2003 dan 19 Ogos 2003 masing-masing dialamatkan kepada Amiruddin. Kesemua dokumen-dokumen ini dan hal keadaan adalah mencukupi untuk menyangkal dakwaan Bank CIMB
G bahawa Bank CIMB tidak mempunyai pengetahuan berkenaan surat ikatan penyerahhakan tersebut. Bank CIMB, pada setiap masa, mempunyai pengetahuan konstruktif bahawa wang dalam Akaun Dana Jaminan telah diserahhak kepada Sebang Gemilang dan wang tersebut adalah milik Sebang Gemilang.

H **(3)** Dengan mempunyai pengetahuan tentang penyerahhakan tersebut, ia mengenakan tanggungjawab ke atas Bank CIMB supaya tidak mengambil bahagian dalam sesuatu pecah amanah. Bank CIMB tidak boleh mengabaikan kepentingan Sebang Gemilang. Sekurang-kurangnya, Bank CIMB harus berkomunikasi dengan Amiruddin apabila diminta oleh
I Hamidi Tech Sdn Bhd untuk menutup Akaun Dana Jaminan tersebut. Dengan menutup Akaun Dana Jaminan, Bank CIMB telah melucutkan kepentingan Sebang Gemilang dan adalah bertanggungjawab untuk pecah amanah.

(4) Apabila pli *res judiciata* dibangkitkan, adalah perlu untuk mengenal pasti dengan ketepatan isu yang telah diputuskan dalam prosiding yang terdahulu. Hakim bicara telah membuat penemuan tertentu semasa prosiding interlokutori bahawa Bank CIMB mempunyai milikan dokumen dan dengan itu mempunyai pengetahuan tentangnya. Penemuan ini telah disahkan oleh Mahkamah Rayuan dalam prosiding yang terdahulu. Tidak kira sama ada perintah berkenaan adalah muktamad atau interlokutori. Ia bagaimanapun mengikat mahkamah dan semua pihak dan tidak boleh dibuka semula.

Case(s) referred to:

Carl-Zeiss-Stiftung v. Herbert Smith & Co (a firm) (No. 2) [1969] 2 All ER 367 ***(refd)***
CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(dist)***
Coghlan v. Cumberland [1898] 1 Ch 704 ***(refd)***
Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors (And Other Appeals) [2003] 4 CLJ 505 CA ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Interveners) [1996] 4 CLJ 52 HC ***(refd)***
Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener) [1996] 3 CLJ 635 FC ***(refd)***
Twinsectra Ltd v. Yardley [2002] 2 All ER 377 ***(refd)***
UMW Industries (1985) Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)

For the appellant - Shanti Morgan; M/s Shearn Delamore & Co
For the respondent - Kamalanathan Ratnam (Vinod Kamalanathan with him); M/s Vinod Kamalanathan & Assocs

[Appeal from High Court, Kuantan; Suit No: 22-129-2009]

Reported by Sandra Gabriel

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] For ease of reference, we will refer to the appellant as "the first defendant", the respondent as "the plaintiff" and Hamidi Tech Sdn Bhd as "the second defendant".

[2] This is the first defendant's appeal against the decision of the High Court at Kuantan allowing the plaintiff's claim against the first defendant and the second defendant. The second defendant was not represented by solicitors in the High Court and did not give any evidence during the trial.

[3] At the conclusion of the appeal hearing, we dismissed the first defendant's appeal which costs. We now give the detailed reasons for our decision.

Fact Of The Case

[4] Shorn of unnecessary details, the relevant facts of the case are simple and may be summarised thus:

(a) On 5 April 1994, the second defendant opened a current account with the first defendant. Mohd Hamidi bin Dato' Haji Abd. Hamid was the sole signatory at the material time.

(b) Over a period of two years (2001 - 2002), the second defendant was awarded three construction projects by the Government of Malaysia. The three projects are:

(i) Membina dan Menyiapkan Klinik Kesihatan Jenis 3 dan Lain-Lain Kerja yang Berkaitan di Jengka 22, Maran, Pahang;

(ii) Membina dan Menyiapkan Asrama (100 Lelaki/100 Perempuan) dan Dewan Makan di Sekolah Menengah Kebangsaan Lepar, Pekan Pahang; dan

(iii) Membina Asrama dan Dewan Makan Sekolah Menengah Kebangsaan Sg Koyan, Kuala Lipis.

(c) On 2 October 2001 and 10 June 2002, the first defendant granted to the second defendant various loan facilities to finance the projects. Based on the terms of the letters of offer, a sinking fund account was created and 5% of every progress payment received by the second defendant will be deducted in the form of fixed deposit under lien to the bank/first defendant.

(d) The second defendant proceeded with the construction of the said three projects but was unable to complete them.

(e) The second defendant then executed a deed of assignment and a power of attorney, both dated 19 September 2003, in favour of the plaintiff. This was to enable the plaintiff to complete the projects.

(f) On 6 May 2004, the second defendant made an application to first defendant to add one Amiruddin bin Ahmad as another signatory for the current account. Amiruddin was a director of the plaintiff.

(g) On 20 May 2004, the second defendant passed a board resolution to approve a change in the authorised signatures in respect of the current account.

(h) The plaintiff completed the projects. On 11 July 2005, upon the second defendant's request, the first defendant closed the sinking fund account and credited the fixed deposit to second defendant's current account.

(i) On 20 December 2006, the second defendant passed another director resolution to remove Amiruddin bin Ahmad as the signatory. On 22 December 2006, a copy of the resolution was given to the first defendant.

(j) After the expiry of the defects liability period, the plaintiff approached the first defendant for the release of the monies accumulated in the sinking fund. The plaintiff then discovered that the sinking fund account has been closed.

(k) The plaintiff then sued both the defendants and claimed for the following reliefs:

As against the first defendant:

(i) discovery of the actual amount that finally accrued in the sinking fund account;

(ii) discovery of the person to whom the said sum was released to;

(iii) plaintiff's entitlement to the actual sum that was released to the person/persons/company other than the plaintiff;

(iv) general damages for breach of contract;

(v) general damages for negligence;

(vi) general damages for monies had and received and for breach of obligations as a debtor;

(vii) general damages for breach of trust;

(viii) general damages for breach of the BAFIA; and

(ix) general damages for conspiracy to injure.

As against the second defendant:

(i) discovery of the person to whom the amount from the sinking fund was released to;

(ii) a claim for the actual sum that was released to the person/persons/company other than to the plaintiff; and

(iii) general damages for conspiracy to injure.

Decision Of The High Court

[5] The High Court found in favour of the plaintiff and made the following orders against the first defendant:

(i) an order for discovery of the actual amount that finally accrued in the sinking fund account and the total amount paid by the first defendant to the second defendant from the sinking fund;

(ii) upon determination of the said sum, the first defendant is to pay the sum to the plaintiff;

(iii) interest of 4% per annum from the date of the writ was issued to the date of full settlement; and

(iv) costs to be taxed or agreed by the parties.

[6] The key findings made by the learned trial judge were as follows:

(i) there was an assignment between the plaintiff and the second defendant based on the deed of assignment and the power of attorney dated 19 September 2003;

(ii) the second defendant had assigned all rights, title and interest of the said projects to the plaintiff;

(iii) PW1 (director and shareholder of the plaintiff) testified that he had personally handed over a copy of the deed of assignment and the power of attorney to DW1;

(iv) prior to the execution of the deed of assignment and the power of attorney, the second defendant was the sole signatory. Amiruddin was added to as another signatory after the execution of the two documents;

(v) the first defendant was aware of the assignment and was in possession of both the deed and the power of attorney;

(vi) pursuant to the two documents, the plaintiff had a right to the monies in the sinking fund when the projects were completed and the defects liability period was over;

(vii) the first defendant owed a duty of care towards the plaintiff;

(viii) The first defendant was negligent in releasing the money to the second defendant without confirming with the plaintiff if it could do so; and

(ix) The plaintiff suffered damages as a result of the breach.

The Appeal

[7] At the outset, we must reiterate that the appeal is by way of re-hearing on law and fact. The principles applied to an appeal by way of re-hearing was stated in 1898 by Lindley MR, delivering the judgment of the Court of Appeal in *Coghlan v. Cumberland* [1898] 1 Ch 704. His Lordship's statement is in language that remains familiar. In summary, Lindley MR said that it is the duty of the appellate court: to re-hear the case; to reconsider the materials before the trial judge together with such material as the appellate court may have decided to admit; to make up its own mind, not disregarding the decision below, but carefully weighing and considering it; not to shrink

from overruling the decision if it is wrong; to be sensible of the great advantage of the trial judge in seeing and hearing the witnesses and, when the decision turns on which witness is to be believed, the appellate court must be guided by the impression made on the trial judge; but circumstances quite apart from manner and demeanour may show whether a statement is credible and may warrant the appellate court differing from the trial judge.

Our Decision

[8] With the above principles in mind, we now proceed to consider the merits of this appeal.

[9] The decision of the High Court was assailed on several grounds. We will deal with these grounds in details below.

Effective Assignment

[10] Learned counsel for the first defendant submitted that there was no effective assignment, whether absolute or otherwise, in favour of the plaintiff. This is because the assignment made no reference to the sinking fund and no written notice had been given to the first defendant.

[11] In support on his submission, learned counsel for the first defendant referred us to s. 4(3) of the Civil Law Act 1956 ("CLA"). According to learned counsel, the conditions for effecting an absolute legal assignment are:

(i) that the assignment must be in writing under the hand of the assignor;

(ii) that the assignment must be absolute and not by way of charge only; and

(iii) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

(See *UMW Industries (1985) Sdn Bhd v. Ah Fook* [1996] 1 CLJ 379).

[12] Learned counsel for the first defendant also relied on the Federal Court decision in the case of *Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener)* [1996] 3 CLJ 635; [1996] 2 MLJ 369 where the court held that the plaintiff cannot find fault with the first defendant when it was the plaintiffs who failed to give written notice of the assignment.

[13] With respect, we disagree. We have examined the deed of assignment dated 19 September 2003. We are convinced that the document is capable of constituting a valid assignment under s. 4(3) of CLA. In our view, failure of the plaintiff to comply with the condition (iii) does not prevent the plaintiff from proceeding with its action on the basis that it is an equitable assignee in which the assignor ie, the first defendant has been made a party to the proceedings. The Federal Court in *Scotch Leasing Sdn Bhd (supra)* had discussed at length the desirability of giving written notice to the debtor or

A trustee of the assignment. The court stated that the validity of an equitable assignment (ie, an assignment of a chose-in-action to a third party without the consent of the other party to the contract) is not affected by any failure to comply with the requirements as laid down in s. 4(3) of the CLA, in particular, the failure by the assignee to give notice.

B **Constructive Trust**

[14] This brings us to the next question as to whether the first defendant had knowledge of the assignment. In the case of *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Interveners)* [1996] 4 CLJ 52, Anuar J, (as he then was), observed:

C

> Many of the equitable doctrines are premised upon a person's knowledge of a state of affairs being the catalyst to the raising of an equity against him. Without that knowledge, there is no justification in equity for holding him out of the full enjoyment of his rights because his 'conscience' is clear.

D

[15] We have scrutinised the evidence on record. In our view, SP1's oral evidence is sufficient to show that the first defendant was aware of the assignment. SP1 testified that he had personally delivered both the deed of assignment and the power of attorney to SD1. SD1 had informed SP1 that that there was no necessity for the bank to issue an acknowledgment receipt. The learned trial judge preferred the evidence of SP1's to that of SD1. Her Ladyship found that it was improbable for SD1 to claim ignorance of the documents when SD1 was the personnel responsible for the loan facilities and all related matter since 10 June 2002.

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F **[16]** We have no doubt that the change of signatory in 2004 was clearly based on the deed of assignment. The second defendant had instructed the first defendant by letter dated 20 May 2004 to add one Amiruddin bin Ahmad as second signatory for the current account. The first defendant's office memorandums dated 25 June 2003, 15 August 2003 and 19 August 2003 respectively were addressed to Amiruddin. All these documents and the circumstances were sufficient to refute the first defendant's allegation that the bank/first defendant was never aware of the deed of assignment. The first defendant, at all material times, had constructive knowledge that the monies in the sinking fund had been assigned to the plaintiff and the money belonged to the plaintiff.

G

H **[17]** Learned counsel for the first defendant further contended that the assignment was executed without consent of the first defendant. With respect, with disagree. One must appreciate that by having knowledge of the assignment, it cast a duty on the bank/first defendant not to participate in a breach of trust. The first defendant could not ignore the interests of the plaintiff. At the very least, the first defendant ought to have communicated with Amiruddin when it was requested by the second defendant to close the sinking funds account.

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[18] Another contention of learned counsel for the first defendant was that the bank could not be faulted for merely acting in accordance with the normal banker-customer relationship. The first defendant's contention was premised upon the Federal Court decision in the case of *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1. The brief factual matrix of that case is this. Pesaka Astana obtained three government contracts. Maybank Trustee was the trustee of loans given to Pesaka Astana. The loan was secured by designated accounts to be assigned to the bondholders whereby proceeds from the government contract were to be paid into these accounts and these proceeds were supposed to pay off the loans. The Court of Appeal held that CIMB Bank was liable to Maybank Trustee as constructive trustee since it knew about the assignment of these proceeds to Maybank Trustee, and hence, should not have allowed its customer, Pesaka Astana, to withdraw the monies from the account. The Federal Court held that CIMB Bank was not liable to Maybank Trustee for merely acting in accordance with the normal banker-customer relationship. The apex court adopted the combine tests of an objective and subjective test as propounded in the House of Lords' decision of the case of *Twinsectra Ltd v. Yardley* [2002] 2 All ER 377 and held that there was no dishonesty on the part of CIMB.

[19] With respect to learned counsel for the first defendant, the case of *Maybank Trustee* was decided in the parameters of its own set of facts. In this case, the court found that there was no cogent evidence to prove that CIMB was dishonest in the ordinary standards of reasonable and honest people when it transferred the monies to other account.

[20] In the case of *Carl-Zeiss-Stiftung v. Herbert Smith & Co. (a firm) (No. 2)* [1969] 2 All ER 367, the court opined that an element of dishonestly or of consciously acting improperly was required to be established before a trustee could be said to have breached a trust.

[21] In this instant appeal, the first defendant's conscience could not be said to be clear. To begin with, the first defendant had all prior knowledge about the assignment. By closing the sinking fund account, the first defendant had deprived plaintiff of its interest and was liable for breach of trust.

Interlocutory Applications

[22] The final submission advanced by learned counsel for the first defendant was that in respect of the effect of the orders made during interlocutory proceedings.

[23] On 25 February 2011, the plaintiff filed a summons for interrogatory against the first defendant to require the first defendant to give answers in regards of documents (including the deed of assignment and the power of attorney) provided in the plaintiff's bundle of document which the plaintiff

claimed to be in the first defendant's possession. The Registrar allowed the application and found that the first defendant had possession of the documents. The learned trial judge affirmed the Registrar's decision and found that:

> Oleh yang demikian nyataan Defendan Pertama bahawa mereka tiada pengetahuan mengenai akaun, sinking fund dan bayaran yang patut dibuat kepada plaintif adalah tidak berasas.

The first defendant's appeal to the Court of Appeal was dismissed on 26 April 2012.

[24] On or about 4 February 2013, the first defendant filed an application to amend its statement of defence after the conclusion of the trial but was dismissed by the trial judge.

[25] The first defendant contended that orders made during interlocutory proceedings are not binding on the final judgment. Therefore, the learned trial judge erred in relying on the principle of *res judicata*.

[26] With respect, we disagree with the first defendant's submissions. When the plea of *res judiciata* is raised, it is necessary to identify with precision the issue that was decided in the earlier proceedings (See *Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors (And Other Appeals)* [2003] 4 CLJ 505; [2003] 4 MLJ 654). In this instant appeal, the trial judge had made specific findings during the interlocutory proceedings that the first defendant was in possession of the documents and thus having knowledge of them. These findings were affirmed by the Court of Appeal in the earlier proceedings.

[27] As correctly argued by learned counsel for the plaintiff, it did not matter whether the order in question was final or interlocutory; it was nevertheless binding on the court and all parties and may not be reopened the same. (See *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57).

Conclusion

[28] For the foregoing reasons, we dismissed the appeal with costs of RM30,000. We also ordered that the deposit to be refunded to the first defendant.